

FILED
SUPREME COURT
STATE OF WASHINGTON
5/27/2020 1:49 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
6/5/2020
BY SUSAN L. CARLSON
CLERK

NO. 98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of Z.J.G. and M.G., Minors,

Scott James Greer,

Appellant,

v.

Washington State Department of Children, Youth, and Families,

Respondent.

**AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR
REVIEW BY LEGAL COUNSEL FOR YOUTH AND CHILDREN,
NORTHWEST JUSTICE PROJECT, AND WASHINGTON
DEFENDER ASSOCIATION**

**LEGAL COUNSEL FOR YOUTH
AND CHILDREN**

Colleen Shea-Brown, WSBA #39897
P.O. Box 28629
Seattle, WA 98118
Tel. & Fax (206) 494-0323
colleenlcyc@gmail.com

WASHINGTON DEFENDER ASSOCIATION

Ali Hohman, WSBA #44104
110 Prefontaine Pl S, Ste 610
Seattle, WA 98104
Tel. (206) 623-4321
Fax (206) 623-5420
ali@defensenet.org

NORTHWEST JUSTICE PROJECT

Jennifer Yogi, WSBA #31928
Cina Littlebird, WSBA #51417
401 2nd Ave South, Ste. 407
Seattle, WA 98104-3811
Tel. (206) 464-1519
Fax (206) 624-7501
jennifery@nwjustice.org

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY AND INTEREST OF AMICI CURIAE.....	1
II. ISSUE ADDRESSED BY AMICI.....	1
III. ARGUMENT.....	1
A. The Washington State Legislature recognized that an essential component of realizing ICWA’s purpose was the earliest possible identification of Indian Children.....	3
1. To ensure proper and prompt identification of Indian Children, ICWA created a two-part safeguard mechanism: if there is reason to suspect that a child could be an Indian Child, ICWA is applied until it is proven that the child is not an Indian Child.....	3
2. The State Legislature’s passage of WICWA reaffirmed the key safeguard mechanism.....	6
3. The WICWA adopted the State’s child welfare practices in place at the time, further affirming the key safeguard mechanism.....	7
B. The decision below fatally undermines the goals of ICWA and WICWA as codified in their safeguard mechanisms by effectively requiring state courts to make determinations that can only be made by tribes	10
1. ICWA’s procedural mechanisms would be eviscerated if read to require conclusive proof of membership before requiring tribal notice since only the tribe can make that determination.....	10
2. Determining the relationship between tribal ancestry and membership is a decision specifically reserved for tribes, not state courts, yet the decision below would allow state courts to make this determination without tribal involvement.....	11
3. Tribal membership for the purposes of ICWA is	

TABLE OF CONTENTS

	<u>Page</u>
distinct from tribal enrollment, and the decision below confuses the two.....	13
4. If affirmed, the decision below will cause grave harm since it allows state courts to foreclose ICWA’s application to Indian Children.....	16
C. ICWA exemplifies the best practices in child welfare of ensuring strong safeguards are in place to prevent removing children from their homes unnecessarily.....	17
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 202 P.3d 971 (2009).....	7
<i>In re Dependency of K.N.J.</i> , 171 Wn.2d 568, 575, 257 P.3d 522 (2011).....	17
<i>In re Dependency of T.L.G.</i> , 126 Wn. App. 181, 108 P.3d 156 (2005).....	11
<i>In re Kahlen W.</i> , 233 Cal. App. 3d 1414, 285 Cal .Rptr. 507 (Cal. Ct. App. 1991).....	4
<i>Matter of Adoption of T.A.W.</i> , 186 Wn.2d 828, 383 P.3d 492 (2016).....	6-7
<i>Matter of L.A.M.</i> , 727 P.2d 1057 (Alaska 1986).....	4
<i>Matter of N.A.H.</i> , 418 N.W.2d 310 (S.D.1988).....	4
<i>Matter of S.R.</i> , 394 Mont. 362, 436 P.3d 696 (2019).....	4-5
<i>Matter of Welfare of M.S.S.</i> , 86 Wn. App. 127, 936 P.2d 36 (1997).....	4
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).....	10

Statutes

25 U.S.C. §§ 1901-1963.....	1
25 U.S.C. § 1902.....	17
25 U.S.C. § 1903.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
25 U.S.C. § 1912(d).....	19
25 U.S.C. § 1912(e).....	19
25 U.S.C. § 1915(b).....	19
RCW 13.34.020.....	17
Ch. 13.38 RCW.....	1
RCW 13.38.030.....	6, 7-8
RCW 13.38.030(2).....	18
RCW 13.38.040.....	19
RCW 13.38.040(7).....	13
RCW 13.38.050.....	8
RCW 13.38.070(1).....	7
RCW 13.38.070(2).....	7
RCW 13.38.130(1).....	19
RCW 13.38.130(2).....	19
RCW 13.38.130(3).....	19
RCW 13.38.180.....	19

Regulations

25 C.F.R. § 23.107(a), (b).....	9
25 C.F.R. § 23.107(b)(2).....	3
25 C.F.R. § 23.107(c).....	4

TABLE OF AUTHORITIES

Other Authorities	<u>Page</u>
44 Fed. Reg. 67,343 (Nov. 26, 1979).....	9
Admin. for Children Youth & Families, U.S. Dep’t of Health & Human Servs., Information Memorandum on Family Time and Visitation for Children and Youth in Out-of-Home Care (Feb. 5, 2020).....	20
Bob Ferguson & Fawn Sharp, <i>Native children benefit from knowing their heritage. Why attack a system that helps them?</i> WASH. POST, (Mar. 20, 2019), available at https://www.washingtonpost.com/opinions/2019/03/20/ native-children-benefit-knowing-their-heritage-why-attack- system-that-helps-them/	2
Bureau of Indian Affairs, U.S. Dep’t of Interior, Guidelines for Implementing the Indian Child Welfare Act 11 (Dec. 2016).....	3-4, 9
H.R. Rep. No. 1386, 95th Cong., 2d Sess. (1978).....	17
Nat’l Council of Juvenile & Family Court Judges, <i>Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases</i> , 14 (2016), available at https://www.ncjfcj.org/publications/enhanced-resource- guidelines/	18-20
Wash. State Children’s Admin., Indian Child Welfare Manual (2000).....	8
Wash. State Children’s Admin., Indian Child Welfare Manual (2016).....	9

I. IDENTITY AND INTEREST OF AMICI

For the identity and interest of the Amici, please refer to the Motion for Leave to File Amici Curiae Brief submitted by Legal Counsel for Youth and Children, Northwest Justice Project, and Washington Defender Association.

II. ISSUE ADDRESSED BY AMICI

Whether the Court of Appeals incorrectly decided there was no reason to know the children were “Indian children,” thereby limiting the rights of Native American children, tribes, and families contrary to federal and state laws.

III. ARGUMENT

The current decision prevents tribal rights, as codified in the federal ICWA and state WICWA,¹ from being realized, frustrating both the government-to-government relationship the state has with tribes and the rights of individual tribal members. Because the Court of Appeals incorrectly conflated tribal *enrollment* with tribal *membership*, it erred in concluding that there was no reason to know the children were Indian Children. The decision’s interpretation of the “reason to know” standard

¹ This brief refers to the Washington State Indian Child Welfare Act as “WICWA” (ch. 13.38 RCW.) and the federal Indian Child Welfare Act as “ICWA” or the “federal Act” (25 U.S.C. §§ 1901-1963).

impedes prompt and correct identification of tribal children, contrary to state law, legislative intent, and the best interests of Indian Children.

The Washington State Attorney General astutely noted:

Having survived genocide, catastrophic plagues and systematic oppression on a continental scale, tribes have withstood the test of time by painstakingly rebuilding their identities and healing their communities one child, one family at a time. The multigenerational trauma already caused by centuries of family disruption and dismemberment has only compounded the importance to tribal nations of ensuring their little ones are given every opportunity to retain their identity and home among their people.

Bob Ferguson & Fawn Sharp, *Native children benefit from knowing their heritage. Why attack a system that helps them?* WASH. POST, (Mar. 20, 2019), available at <https://www.washingtonpost.com/opinions/2019/03/20/native-children-benefit-knowing-their-heritage-why-attack-system-that-helps-them/>. If state actors are permitted to find there is not a reason to know that ICWA may apply on the facts presented in this case – when the children are in fact Indian Children and when sufficient information to determine there was reason to know they were Indian Children was presented at the shelter care hearing – then the protections of this law, and the ability of the law to prevent Indian Child removal, have been severely undermined, if not eliminated.

A. The Washington State Legislature recognized that an essential component of realizing ICWA's purpose was the earliest possible identification of Indian Children.

The proper and prompt identification of Indian Children is so crucial to achieving the policy goals of ICWA that care has been taken both at the federal and the state levels to make certain that the urgency cannot be read out of the statutes' application. The federal guidelines are explicit: "If th[e] inquiry [into whether ICWA applies] is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies." BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 11 (Dec. 2016) [hereinafter BIA GUIDELINES].

1. To ensure proper and prompt identification of Indian Children, ICWA created a two-part safeguard mechanism: if there is reason to suspect that a child could be an Indian Child, ICWA is applied until it is proven that the child is not an Indian Child.

In order to address the timeliness concern, ICWA established a key two-part safeguard mechanism: if there is reason to suspect that a child could be an "Indian Child", the protections of ICWA apply until it is conclusively determined that the child is not an "Indian Child". 25 C.F.R. § 23.107(b)(2). Since the entire purpose of this mechanism is to identify all Indian Children (rather than just most or some), the attendant provisions

must be read expansively, erring on the side of over-inclusion rather than under-inclusion. BIA GUIDELINES at 11. This purpose is self-evident in the existence of the second part of the safeguard mechanism since, critically, the presumption operates to potentially afford ICWA protections to some non-Indian Children rather than vice versa, i.e., rather than requiring dispositive proof of being an Indian Child to trigger ICWA’s protections.

The first part of the safeguard mechanism – the “reason to know” provision – is the federal standard for triggering ICWA’s tribal notice² and eligibility determination requirements. And, in line with the goal of protecting as many Indian Children as possible, erring on the side of over-inclusion, the bar for the trigger is low.³ The regulations provide a list of factors that determine when a court has “reason to know” the child is an “Indian Child”, 25 C.F.R. § 23.107(c), and the BIA’s 2016 guidelines urge state courts and agencies to interpret these factors expansively, as a more stringent construction would defeat ICWA’s manifest purpose and

² Notice ensures that a tribe will be afforded the opportunity to assert its rights under ICWA. *Matter of Welfare of M.S.S.*, 86 Wn. App. 127, 134, 936 P.2d 36 (1997) (citing *In re Kahlen W.*, 233 Cal. App. 3d 1414, 1421, 285 Cal .Rptr. 507 (Cal. Ct. App. 1991)). The State has the burden of proving that the notices sent complied with the ICWA. *Id.* at 136 (citing *Matter of N.A.H.*, 418 N.W.2d 310, 311 (S.D.1988); *Matter of L.A.M.*, 727 P.2d 1057, 1060–61 (Alaska 1986)).

³ “Reason to know” is a low standard but not an unlimited one as it does require more than a bare, vague, or equivocal assertion of possible Indian ancestry. *Matter of S. R.*, 394 Mont. 362, 377, 436 P.3d 696 (2019).

command. *Matter of S.R.*, 394 Mont.362, 377, 436 P.3d 696 (2019). This is because if a tribe never receives notice, the court is unlikely to obtain the most accurate evidence of the child's Indian status.

A note should be made here on the difference between preliminary contacts and tribal notice. The purpose of preliminary contacts are to assess whether there may be reason to know the child is an Indian Child. It is not to establish whether the child *is* a member or eligible for membership, since only the tribe – through the person designated to make such determinations – can do that. Given factors such as inconsistent mail and phone lines and complex government structures, reaching out to a tribe in some manner other than that prescribed by ICWA (i.e., written notice to the Designated Tribal Agent), will not necessarily succeed in reaching the person at the tribe with the requisite authority to determine the child's membership. But, preliminary contacts are crucial for gathering indicia of Indian child status – such as residence on a reservation, involvement in tribal court proceedings, and evidence that other lineal family are members of the tribe – that can then trigger the requirement for tribal notice. The bar for triggering tribal notice is low, but not so low that it is triggered by any suggestion of a nebulous claim to Indian ancestry. Rather, notice should be sent to the child's potential tribes when specific connections to particular

tribes are known, knowledge which is often gained through preliminary contacts.

2. The State Legislature's passage of WICWA reaffirmed the key safeguard mechanism.

Washington reaffirmed the federal intentions vis-à-vis proper and prompt identification of Indian Children in its passage of WICWA. First, the Legislature passed WICWA to require that ICWA was consistently applied, applied at the earliest opportunity, and robustly implemented to meet its objectives of keeping Indian Children in their homes and connected to their tribal identities. RCW 13.38.030 (explaining that, in order to protect “essential tribal relations and best interests of Indian children,” WICWA’s purpose was “clarifying existing law;” and further explaining that the WICWA “specifies the *minimum* requirements that must be applied in a child custody proceeding and does not prevent the [adoption of higher standards of protection]” (emphasis added)). These statements make clear that the Legislature’s intent was to clarify the federal Act’s prerequisites so they could not be evaded or interpreted in a way that minimizes their exacting demands.⁴

⁴ The Washington Supreme Court affirmed this reading in *Matter of Adoption of T.A.W.* 186 Wn.2d 828, 383 P.3d 492 (2016). In *T.A.W.*, the court examined the “existing Indian family exception” that exempted application of ICWA in cases where the child was not being removed from an existing Indian family unit or a family with certain tribal ties. *Id.* at 857. The court held this judicially-created doctrine was in fact overruled by WICWA, reaffirming WICWA’s intent to ensure

As to tribal notice, the Legislature specified that “[t]he determination of the Indian status of a child shall be made as soon as practicable in order to serve the best interests of the Indian child and protect the interests of the child’s tribe.”⁵ RCW 13.38.070(2). WICWA then *clarifies* the federal ICWA by requiring tribal notification in cases where the petitioner or court has reason to know that “the child is or *may be*” an Indian Child. RCW 13.38.070(1) (emphasis added). The Legislature’s inclusion of the words “may be” in WICWA’s “reason to know” provision is a crucial clarification since reading the provision more narrowly – as requiring indicia of enrollment or membership directly – frustrates WICWA’s and ICWA’s goals of early application of ICWA’s protections for Indian Children and of enforcing tribes’ right to participate in cases involving their children. This interpretation of the Legislature’s intent is reinforced elsewhere in WICWA, as outlined below.

3. The WICWA adopted the State’s child welfare practices in place at the time, further affirming the key safeguard mechanism.

The Legislature directed courts to interpret WICWA using the Department’s (the entity that is now the Department of Child, Youth and

that ICWA’s provisions were being applied and implemented to the fullest extent of the law. *Id.* at 857-858.

⁵ Tribes have independent interests in Indian Children and must be allowed to participate in hearings in which their interests are significantly implicated. *In re Custody of C.C.M.*, 149 Wn. App. 184, 198, 202 P.3d 971 (2009).

Family, hereinafter Department) manual of Indian Child welfare (hereinafter ICW Manual) as persuasive authority, providing that WICWA “shall not be construed to reject or eliminate current policies and practices that are not included in its provisions.” RCW 13.38.030. At the time WICWA passed, the state’s Indian Child Welfare Manual directed that the “department *must* consider the child to be Indian if any one of the following circumstances exist: . . . (2) The referrer, the child, the child’s parent(s)/Indian custodian(s), or relatives give reason to believe that the child *is Indian*. (3) The social worker discovers information *suggesting* the child is Indian.” Wash. State Children’s Admin., Indian Child Welfare Manual, § 03.20(4) (2000) (emphasis added).

Notably, in this beginning stage of the process, the policy refers to knowledge about whether the child is Indian, not about whether the child is an “Indian Child” as defined by the Act. More clearly, the policy provides that indicia of a child being Indian is enough to trigger the requirement that the Department must contact the tribe(s), *Id.* at § 03.20(5), at which point the tribe(s) would have the opportunity to confirm or deny whether the child is an “Indian Child”. And, WICWA makes clear that preliminary contacts to determine a child’s possible Indian status do not constitute legal notice. RCW 13.38.050.

The current ICW Manual reaffirms this intent of the earlier manual.

Citing 25 CFR § 23.107(a), (b), the manual instructs:

[Children’s Administration (CA)] must use “due diligence” to “identify and work with all the tribes of which there is reason to know the child may be a member (*or* eligible for membership), to verify whether the child is in fact a member” CA must “treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition” of an Indian child.

Wash. State Children’s Admin., Indian Child Welfare Manual, § 03.20(5) (2016).⁶ The subsequent instructions direct case workers to ask about Indian ancestry, not simply tribal enrollment or membership, implying that ancestry is sufficient “reason to know” a child may be a member or eligible for membership.

In these ways, both the federal and state acts, and their respective guidelines, compel a proactive search into tribal membership if connection to a tribe is suspected. Both contemplate that conclusive evidence of membership may not be immediately available and may require ongoing communication with the relevant tribe(s). Neither require conclusive evidence or assertions of tribal membership or enrollment before more inquiry is conducted or other ICWA protections are applied. Both clearly

⁶ Both the BIA guidelines in effect in 2011 and the current BIA guidelines and ICWA regulations require the same presumptive application of ICWA. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,343, 67,586 (Nov. 26, 1979); BIA GUIDELINES at 12.

instruct that if tribal membership is a possibility, i.e., if a connection to a specific tribe exists, cases should be treated as ICWA cases until the tribe determines the child is not an Indian Child, rather than treating the child as non-Indian until proven otherwise.

B. The decision below fatally undermines the goals of ICWA and WICWA as codified in their safeguard mechanisms by effectively requiring state courts to make determinations that can only be made by tribes.

1. ICWA's procedural mechanisms would be eviscerated if read to require conclusive proof of membership before requiring tribal notice since only the tribe can make that determination.

ICWA's procedural safeguard mechanisms would break down if read as the court below has authorized. The only entity that can conclusively determine tribal membership or non-membership is the tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). An Indian Child only receives ICWA's protections if the court deems that ICWA applies to the case. The tribe only receives notice if ICWA's protections are triggered. Thus, the Court cannot require proof of membership or enrollment before applying ICWA if the possibility of tribal membership exists. Otherwise, there is no enforcement mechanism for ensuring that that possibility is confirmed or denied. Accordingly, where children have tribal connections, both WICWA's text and the Department's

policies direct the application of ICWA protections until it is proven that a child is not an Indian Child.

The decision below acknowledges as much. In its explanation of the governing law, the Court explained, “T.L.G. correctly identifies that *only the tribe can definitively answer whether an individual is a member of that tribe.*” Decision at 21 (emphasis added) (citing *In re Dependency of T.L.G.*, 126 Wn. App. 181, 108 P.3d 156 (2005)). It goes on to state that “[w]hen the Department fails to reach out to *potential tribes*, as in T.L.G., those tribes are unable to make a conclusive determination concerning membership,” thereby frustrating WICWA. *Id.* (emphasis added). Acknowledging there is “reason to know” a child may be a member of a particular tribe then makes that tribe a “potential tribe” entitled to notice. A court, then, cannot determine the children are not “Indian Children” before a tribe has an opportunity to investigate and make an informed decision, confirming or *denying* membership, without frustrating ICWA’s goals.

2. Determining the relationship between tribal ancestry and membership is a decision specifically reserved for tribes, not state courts, yet the decision below would allow state courts to make this determination without tribal involvement.

Though Indian ancestry is not dispositive evidence of membership in a tribe, once tribal ancestry with a particular tribe is known, there is a possibility that a child may be a tribal member. This is not a charge to apply

ICWA in any case where someone suggests some general, nebulous claim to Native American ancestry. But, where a child is known to be connected to a specific tribe, as here, there is an indication that the child may be a member of that tribe until the tribe says otherwise. Knowledge of lineal relatives who are members of the tribe then heightens the likelihood that the child may be a tribal member or eligible for membership. The “reason to know” door has been opened, and once that door is opened, WICWA and ICWA are clear that it must remain so until definitively closed.

In this case, neither the court nor the parties knew the tribal membership requirements of the three identified tribes. Thus, they could not know whether ancestry was an indicator of possible membership or eligibility for membership in any of the identified tribes. Consequently, the court erred in finding that there was no reason to know the children were Indian Children when it knew about direct heritage with specific tribes. Such a finding equated to a definitive determination by the court that Indian ancestry could not be a basis for membership in any of the three identified tribes. That is not a determination for the court to make.

The court’s mistake was likely founded in a good-intentioned insight: the decision below keenly drew out the importance of the distinction between Indian as a political versus racial status, citing for example, to the BIA comments that “ICWA does not apply based on a child or parent’s

Indian ancestry. Instead, there must be a political relationship to the tribe.” Decision at 23. It mistakenly, however, took this distinction as a direction to not equate Indian ancestry with a reason to know that a child may be an Indian Child.⁷ Rather, this BIA comment is meant to emphasize the fact that not all people who are racially American Indian/Alaska Native (AI/AN) hold the political status of being Indian to correct a common misconception based on the fact that the vast majority of people with the political status are also racially AI/AN. It is not meant to assert that being racially Indian has no bearing on one’s likelihood of being politically Indian. That is why Indian ancestry mandates further inquiry in both the federal and state policy guidelines.

3. Tribal membership for the purposes of ICWA is distinct from tribal enrollment, and the decision below confuses the two.

The court’s confusion was compounded in another error in the decision below. In applying ICWA’s definition of an Indian Child,⁸ the

⁷ The Department also confuses this issue in arguing that ICWA’s direction to look for political affiliation with a tribe suggests Indian heritage is not a possible indicator of tribal membership. *E.g.*, Supplemental Br. of the Dep’t at 11-12 (stating, for example, “all of the factors relate to information showing membership with a tribe, and none rely merely on Indian heritage”). While heritage is certainly not dispositive of tribal membership, and is therefore insufficient, on its own, to prove that a child is an Indian child, it absolutely heightens the likelihood that a child may be a member of that particular tribe.

⁸ An Indian Child is a child who is either (a) a member of a tribe or (b) eligible for membership and the biological child of a member of a tribe. 25 U.S.C. § 1903; RCW 13.38.040(7).

court mistakenly used *enrollment* information as being dispositive relative to *membership* status.⁹ The court based its decision on whether the children in the case could be Indian Children only on information about the children's and parents' tribal enrollment status. Decision at 9-10. Like ancestry, however, the inferences that can be drawn from enrollment status are not those that the court drew. For example, if a child was tribally enrolled, that would be a strong indicator that that child met subsection (a) of the "Indian Child" definition. If the child was not enrolled, however, that fact provides no bearing on whether the child is likely to meet or *not meet* subsection (a). Information about the parents' enrollment status likewise provides no information as to the likelihood of the child meeting or not meeting subsection (a).

Yet, the decision below effectively equated enrollment status with membership by treating information about enrollment status as determining the children's likelihood of being members in the specified tribes.¹⁰ For

⁹ The Department did likewise. *E.g.*, Supplemental Br. of the Dep't at 14 (claiming that the testimony that children and their mother were not *enrolled* members equated to evidence that the children and mothers were not *members* of Tlingit and Haida).

¹⁰ The State made this conflation outright, substituting "member" and "membership" for enrollment status when laying out the "facts" of the case. *E.g.*, Combined Resp. of Dep't to Mot. to Recons. & Brs. of Amici Curiae Resp. to Mot. for Discretionary Review at 11-12 (stating, for example, "the tribe itself reported the mother was not a member and the children were not members", when, in fact, the tribe reported that the mother and children were not *enrolled* (Decision at 4);

example, the court noted that the social worker testified that Tlingit and Haida said, “the mother is not *enrolled*, and the children are not *enrolled*.” *Id.* at 4 (emphasis added). The court noted that the mother testified “that she was not an *enrolled* member of a federally recognized tribe.” *Id.* at 5 (emphasis added). And, the court also noted that the social worker, father, and mother all testified to the possibility that the children were eligible for *membership* in various tribes. *Id.* at 4-5. Yet, because no one was currently *enrolled*, the court felt it had enough information to determine that neither prong of the Indian Child definition was likely to apply. This was despite the testimony that the children were likely eligible for tribal membership, providing the court explicit evidence that prong (a) *was* likely to apply to the children, and thus, it had reason to know that the children may be Indian Children as defined by the statutes.

First by determining that ancestry was not a factor in deciding membership for any of the three tribes and then by equating “enrollment” and “membership”, the court overstepped its purview and effectively made the membership determination for the tribes. In these ways, the decision

and “the mother testified she was not a tribal member,” again when the mother testified that she was not *enrolled*, not that she was not a tribal member (Decision at 5)).

below misconstrued the nuances of Indian political status and did not recognize the numerous indicia that the children could be Indian Children.

4. If affirmed, the decision below will cause grave harm since it allows state courts to foreclose ICWA's application to Indian Children.

There will be other children who are not enrolled in their tribes but are tribal members. Under the court's analysis, and the same elicitation of facts from the state, these children will not be treated as Indian Children. If the decision below stands, the impact will deprive those Indian Children, parents, and tribes of ICWA's protections in circumstances when a child's membership or eligibility for membership is not immediately known. That is contrary to the Legislature's intent and the plain language of WICWA.

Prematurely closing the ICWA door meant foreclosing the obligation to apply ICWA protections, even in the instant case. The decision below sanctions the Department's failure to provide notice to the tribes when there was ample evidence presented at the shelter care hearing that the children were Indian Children. Pet. for Rev. 3-5. If the Department had not reached out to the identified tribes – as the court's finding would have absolved it from doing – at least one of the children's tribes would not have known of the opportunity to assert its rights in this case as it has subsequently. Additionally, the children did not benefit from the heightened standard for determining need for placement or attunement to culturally

responsive practices. Most importantly, had the children been correctly identified at the shelter care hearing, the court may have avoided the breakup of an Indian family and the consequent trauma to the children caused by removal.

C. ICWA exemplifies the best practices in child welfare of ensuring strong safeguards are in place to prevent removing children from their homes unnecessarily.

The U.S. Congress believed the principles that underlay the ICWA's provisions protected the best interests of Indian children, emphasizing that maintenance of family structure is a crucial part of what is in a child's best interest. 25 U.S.C. § 1902. WICWA similarly aims to protect the essential tribal relations and best interests of Indian children by maintaining family integrity. The statute itself and interpreting case law make clear that the paramount goal of child welfare legislation is to keep families intact whenever possible. RCW 13.34.020. Maintaining the family unit should be the first consideration in all cases of state intervention into children's lives. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522 (2011).

However, Congress also recognized that any "best interest" standard is somewhat vague and may make it difficult for courts to avoid making decisions based on subjective values, especially ones that use "best interests of the child" to impermissibly intrude upon the private realm of family life. H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 19 (1978). Mindful of this

ambiguity, the Washington Legislature explicitly defined the “best interests of Indian children” to mean the use of practices designed to:

- protect the safety, well-being, development, and stability of the Indian Child;
- *prevent the unnecessary out-of-home placement of the Indian Child;*
- acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; and
- recognize the value to the Indian Child of maintaining a relationship with the child’s tribe and tribal community.

RCW 13.38.030(2) (emphasis added).

This definition is consistent with social work best practices affirming that children’s needs are best met when they stay with their families and maintain ties to their community. When the state intervenes on behalf of abused and neglected children and weighs whether to place children outside the home, it must take into account not only the harm posed by the abuse or neglect, but also the emotional impact of separation. The best plan, if it can be safely implemented, is the child’s own home. Nat’l Council of Juvenile & Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*,

14 (2016) [hereinafter *Enhanced Resource Guidelines*], available at <https://www.ncjfcj.org/publications/enhanced-resource-guidelines/>.

Through the passage of ICWA, Congress adopted rules giving effect to these principles, which are considered best practices in child welfare. ICWA provides heightened protections before an Indian Child can be removed from her parents, and, when removal is necessary, imposes higher standards on child welfare agencies to help parents remedy the shortcomings leading to removal. Requirements to determine the need for placement are higher (25 U.S.C. § 1912(e); RCW 13.38.130(2)), placement preferences exist (25 U.S.C. § 1915(b); RCW 13.38.180), requirements for services prior to non-emergency placement and services to reunify are higher (25 U.S.C. § 1912(d); RCW 13.38.130(1)), and for some states, including Washington, the burden of proof at adjudication and termination of parental rights is higher (RCW 13.38.130(3)). *Enhanced Resource Guidelines* at 91-92. Indian Children and their families should also receive culturally appropriate services. *See* RCW 13.38.040 (defining active efforts to require offering the family culturally appropriate preventive, remedial, or rehabilitative services, including services offered by tribes and Indian organizations whenever possible). ICWA imposes these heightened standards in recognition of the trauma that children will necessarily experience when they are suddenly removed from their parents and

importance of maintaining the child's connection to their parents, extended family, and tribal community in mitigating the effects of separation. *Enhanced Resource Guidelines* at 53; ADMIN. FOR CHILDREN YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., INFORMATION MEMORANDUM ON FAMILY TIME AND VISITATION FOR CHILDREN AND YOUTH IN OUT-OF-HOME CARE (Feb. 5, 2020).

IV. CONCLUSION

Requiring conclusive evidence of tribal membership, or eligibility for membership, in order to trigger the application of WICWA is contrary to WICWA's intent as well as the federal regulations and guidance. Such an interpretation will cause irreparable harm to Indian families and tribes. The decision below must be reversed to prevent further harm to Indian Children, their tribes, and their families and to give full effect to ICWA and WICWA's intended protections.

DATED this 26th day of May, 2020.

By LEGAL COUNSEL FOR YOUTH & CHILDREN
NORTHWEST JUSTICE PROJECT
WASHINGTON DEFENDER ASSOCIATION

/s/Jennifer Yogi
Jennifer Yogi, WSBA No. 31928
Attorney for Amici Curiae, NJP

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Dependency of Z.J.G. and
M.G., Minors,

SCOTT JAMES GREER,

Appellant,

vs.

WASHINGTON STATE
DEPARTMENT OF CHILDREN,
YOUTH AND FAMILIES,

Respondent.

Supreme Court No.
98003-9

CERTIFICATE OF
SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 27th day of May 2020, I caused to be served via the Washington State Appellate Courts' Portal, a true and correct copy of the following:

1. Motion of Legal Counsel for Youth and Children, Northwest Justice Project, and Washington Defender Association for Leave to File Amici Curiae Brief in Support of Petitioner;
2. Amici Curiae Brief in Support of Petition for Review by Legal Counsel for Youth and Children, Northwest Justice Project, and Washington Defender Association;
3. This Certificate of Service.

Upon: Tara Urs
tara.urs@kingcounty.gov

Christina Alburas
calburas@kingcounty.gov

Kelly Taylor
Washington State Attorney General's Office
Kellyt1@atg.wa.gov and shsseaf@atg.wa.gov

Ariell Ikeda
Washington State Attorney General's Office
ariell.ikeda@atg.wa.gov

Lauren Johansen
KCDPD-SCRAPD
lajohans@kingcounty.gov and
scrap.seattle.dependency@kingcounty.gov

King County Dependency CASA
Casa.group@kingcounty.gov

Kathleen Carney Martin
Kathleen.martin@kingcounty.gov

Tiffanie Turner
Tiffanie.turner@kingcounty.gov

La Rond Baker
lbaker@kingcounty.gov

SIGNED at Seattle, Washington, this 27th day of May, 2020.

NORTHWEST JUSTICE PROJECT
/s/Janel Riley
Janel Riley, Legal Assistant
401 Second Ave S., Suite 407
Seattle, WA 98104
Ph: (206) 464-1519
Fax: (206) 624-7501
Email: janelr@nwjustice.org

NORTHWEST JUSTICE PROJECT - NAU

May 27, 2020 - 1:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98003-9
Appellate Court Case Title: In the Matter of the Dependency of Z.J.G. and M.E.J.G., minor children.

The following documents have been uploaded:

- 980039_Briefs_Plus_20200527115641SC522618_0236.pdf
This File Contains:
Briefs - Amicus Curiae
Certificate of Service
The Original File Name was 05 26 20 Greer Amicus Brief WSC and Cert of Svc.pdf
- 980039_Motion_20200527115641SC522618_8744.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 05 26 20 Greer Mot for leave to file amici WSC.pdf

A copy of the uploaded files will be sent to:

- Peter.Gonick@atg.wa.gov
- ariell.ikeda@atg.wa.gov
- brakes@gsblaw.com
- calburas@kingcounty.gov
- casa.group@kingcounty.gov
- changro@seattleu.edu
- cina.littlebird@nwjustice.org
- colleenlcy@gmail.com
- dianab@summitlaw.com
- fort@law.msu.edu
- hillary@defensenet.org
- kathleen.martin@kingcounty.gov
- kellyt1@atg.wa.gov
- lajohans@kingcounty.gov
- lbaker@kingcounty.gov
- litdocket@foster.com
- msobolefflevy@cchita-nsn.gov
- pats@summitlaw.com
- peterg@atg.wa.gov
- pinkhamb@seattleu.edu
- ronw@cirj.org
- scrap.seattle.dependency@kingcounty.gov
- sgoolyef@atg.wa.gov
- shsseaef@atg.wa.gov
- tara.urs@kingcounty.gov
- tiffanie.turner@kingcounty.gov

Comments:

Filing the following documents: 1) Motion of LCYC, NJP, and WDA for Leave to File Amici Curiae Brief in Support of Petitioner; and 2) Amici Curiae Brief in Support of Petition for Review by LCYC, NJP, and WDA and Certificate of Service.

Sender Name: Janel Riley - Email: janelr@nwjustice.org

Filing on Behalf of: Jennifer Masako Yogi - Email: jennifery@nwjustice.org (Alternate Email:)

Address:

500 W. 8th Street, Suite 275

Vancouver, WA, 98660

Phone: (360) 693-6130

Note: The Filing Id is 20200527115641SC522618